Supreme Court, U.S.
FILED
JUN 15 1999
CLERK

No. 98-1799

IN THE
Supreme Court of the United States

KNOX COUNTY EDUCATION ASSOCIATION,
Petitioner,

v.

KNOX COUNTY BOARD OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

ROBERT H. CHANIN
JEREMIAH A. COLLINS
(Counsel of Record)
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

RICHARD L. COLBERT
CORNELIUS & COLLINS
Nashville City Center
511 Union Street
Suite 2700
Nashville, Tennessee 37219-0695
(615) 244-1440

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Chandler v. Miller, 520 U.S. 305 (1997) 1, 8, 9
Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) 1, 6
Treasury Employees v. Von Raab, 489 U.S. 656 (1989) 2, 7, 8, 9
United Teachers v. Orleans Parish School Board, 142 F.3d 853 (5th Cir. 1998) 9
Vernonia School District 47J v. Acton, 515 U.S. 656 (1995) 4, 9

STATUTES

Tenn. Code § 49-6-4205(a) 4
Tenn. Code § 49-6-4209 4
Tenn. Code § 49-6-4212 4
Tenn. Code § 49-6-4213 4
Tenn. Code § 49-6-4301(a) 4

IN THE

Supreme Court of the United States

No. 98-1799

KNOX COUNTY EDUCATION ASSOCIATION,
Petitioner,

v.

KNOX COUNTY BOARD OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

INTRODUCTION

In a series of cases from *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), through *Chandler v. Miller*, 520 U.S. 305 (1997), this Court has made it clear that the Fourth Amendment does not permit government to engage in suspicionless drug testing of employees or other citizens absent a showing that such testing is necessary to address "real and not simply hypothetical" dangers. *Chandler*, 520 U.S. at 319. *See* Petition for a Writ of Certiorari ("Petition") at 10-15. The Sixth Circuit ignored that rule in this case. Relying on what that court described as "common sense," "experience of life," and "intuitive[] understanding[ing]" of how public schools operate, App. 37a-38a and n.23, rather than on record evidence, the court approved suspicionless testing

of applicants for public school teaching positions on the basis of "speculation, and not very plausible speculation at that." *Treasury Employees v. Von Raab*, 489 U.S. 656, 682 (1989) (Scalia, J., dissenting). *See* Petition at 17-19.

Respondent Knox County Board of Education ("Board") contends that we have mischaracterized the decision below, *see* Brief in Opposition ("Opp.") at 1, and the Board labors for eleven pages to describe what it asserts is record evidence supporting the conclusion that suspicionless drug testing of Knox County's teacher candidates is necessary to protect the safety of students. Opp. 1-11. The Board also contends that there are provisions in the Code of Tennessee which place responsibilities on public school teachers that make them tantamount to security officers. *Id.* at 14-19. As we show *infra* at 3-7, however, the evidence the Board cites regarding the supposed safety need for suspicionless drug testing of teacher candidates is so gossamer, and the statutory provisions on which the Board relies are of such little relevance, that one can readily appreciate why the Sixth Circuit found it necessary to resort to "common sense," "experience of life" and "intuitive[] understanding[ing]," rather than to record evidence, in search of support for the testing program. Indeed, the fact that the Board, in the course of its efforts to demonstrate an ostensible safety purpose for the challenged testing, devotes much ink to the concept of teachers as "role models," to the importance of effective teaching, and to other non-safety considerations is a giveaway that the testing policy is not in fact directed at any real safety need. *See infra* at 7-9.

Accordingly, as we asserted in our Petition, and as we elaborate *infra* at 9-10, this case presents an important question as to the type of evidentiary showing that must

be made by a public employer in order to justify suspicionless drug testing of employees. Furthermore, because the court below adopted (and the Brief in Opposition endorses) the position that the challenged testing is justified merely by the fact that teachers have general responsibility to supervise and protect students—a fact that is true, as far as it goes, of *all* public school teachers —this case also presents a more particularized question, likewise of great significance: whether teacher applicants, and in-service teachers as well, in *all* public school systems, can routinely be subjected to suspicionless drug testing without any showing that the duties they actually are called upon to perform are of such a nature as to warrant such an intrusion.

ARGUMENT

1. Like the court below, *see* Petition at 15-16, in attempting to construct a safety rationale for suspicionless drug testing of teacher applicants the Board emphasizes the role teachers may play in reporting student misconduct. *See* Opp. 4, 17, 18. Although, as we note in the margin, that account significantly exaggerates both the record evidence regarding the extent to which Knox County teachers function as ersatz security officers, and the reporting responsibilities placed upon them by Tennessee law,[1] there is a more pertinent point for present

---

[1] Only a small fraction of the incidents that are reported to the Knox County Schools Security Department involving violent conduct, possession of weapons or drugs, or other student behavior are reported by teachers. *See* Exhibit 2A, JA 1122-1140; *see also* JA 936-37. The vast majority of such incidents are reported by students, other school personnel, or security officers. *See* Exhibit 2B, JA 1141-1308.

In depicting the Code of Tennessee as imposing on teachers wide-ranging duties to monitor and report dangerous student behavior, Opp. 14-18, 23, the Board seriously distorts the statutory provisions.

[Footnote Continued]

purposes. Whatever may be the nature and scope of teachers' responsibilities with respect to reporting student misconduct, *there simply is no evidence, nor does the Board purport to cite any, to suggest that suspicionless drug testing is necessary to ensure that teachers will properly carry out those responsibilities. See* Petition at 5, 16, 19.

As for teachers' other purported safety duties, the evidence cited by the Board consists of descriptions by two

---

[1] [Footnote Continued]

For example, the Board claims to find in Code § 49-6-4205(a) an "acknowledg[ement]" by the Tennessee General Assembly "that teachers are the first observers of student misconduct," Opp. 17, because that statutory provision provides (in the Board's cropped quotation) that a student may be searched as a result of "information received from a teacher." What the provision actually states, however, is that a student may be searched "because of information received from a teacher, *staff member, student* or *other person*." The provision thus does not "acknowledge" any special role of teachers.

Only two provisions of the Code place any obligations on teachers to report student misconduct, and they are very narrow: § 49-6-4301(a) requires teachers to report "assault and battery or vandalism endangering life, health or safety committed by a student on school property," and § 49-6-4209 requires *all* "school personnel" to report violations by students of Tennesse's weapon-possession law. Significantly, the Tennessee School Security Act, upon which the Board places great emphasis, *see* Opp. 15-17, provides that *school principals* are to receive "orientation and training . . . designed to familiarize [them] with the provisions of [the Act] and with local policies and procedures for implementing [the Act]," § 49-6-4212, but the statute does not require any such orientation or training for teachers.

The Board also is wrong in declaring that teachers are under a special "statutory responsibility to report student drug . . . offenses." Opp. 18. The responsibility to deal with student drug use rests with the *principal*, who may act, *inter alia*, on information received from a "teacher, *staff member* or *other student*." § 49-6-4213 (emphasis added). *Cf. Vernonia School District 47J v. Acton*, 515 U.S. 656, 664 (1995) (noting that teachers are "ill prepared" for "the . . . function of spotting and bringing to account [student] drug abuse, a task . . . which is not readily compatible with their vocation").

administrators of a teacher's "typical day," and testimony regarding an extraordinary act of heroism by one teacher. *See* Opp. 4-8.[2] The "typical day" scenario described by Betty Sparks, *see* Opp. 4-5, includes such activities as "helping to open milk cartons," "trying to interact with the youngsters . . . so they'll feel good about that specific day," "stopping to talk with a parent about a concern a parent might have," "getting all th[e] reading groups going," "giving positive reinforcements," and the like. JA 872-77. Although this testimony indicates that a teacher's job is "hectic," Opp. 5, it falls far short of establishing a safety need for suspicionless drug testing. The "typical day" testimony of Henrietta Grant likewise is devoid of any demonstration of a safety need for such testing. *See* JA 951-53.[3] The Board enters the realm of

---

[2] The Board also cites the testimony of the Chief of Security that teachers are "most definitely" important to security, Opp. 4, but that testimony refers only to the subject of reporting student misconduct. *See* JA 937, 943.

[3] The tenor of Ms. Grant's testimony is well illustrated by the following exchange, which the Board, in a flight of fancy, characterizes as "[u]nderlining the importance of teacher alertness" (Opp. 5):

Q: Describe for the Court, if you will, what the hallways in Austin-East are like when the seven hundred and sixty-three students are changing classes.

A: [Ms. Grant] Mad house. They're typical teenagers; it's the time to court, have a good time, talk to your friends. And do things that [are] necessary, like going to the bathroom and that kind of thing. We have one period of the day that's longer between classes than the other time is, so it's just a good time for the kids to socialize.

Q: Are there teachers in the hallways when the students are changing classes?

A: Yes.

Q: And what are the teachers supposed to be doing?

[Footnote Continued]

fantasy when it treats such testimony as comparable to the evidence regarding the duties of railroad employees—and the documented role of employee drug and alcohol abuse in causing train wrecks—in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). *See* Opp. 18, 20.

The one instance the Board is able to cite in which a teacher actually did take an action directly affecting student safety and requiring extraordinary alertness—an incident several years ago where a teacher grabbed a knife-wielding student who was in the act of stabbing another student, Opp. 7—is significant precisely because of its atypicality. Although the image of a teacher heroically rescuing a student may be a powerful one, there is no evidence that Knox County's teachers are expected to intervene in knife fights—much less that they are trained, or required to maintain the physical fitness necessary to enable them, effectively to do so. The Board's reference to this incident, and to recent tragic shootings at schools in other parts of the country, *see* Opp. 14-15 n.9, misses the mark. To be sure, violence in the schools is a real problem; and for that reason it requires real solutions. To suggest, however, that suspicionless drug testing of teacher candidates is a meaning-

---

3 [Footnote Continued]

A: They serve as monitors. They stand outside the doors when classes are changing. We have some assigned to just kind of walk around and see what's going on.

* * * *

Q: And do you have teachers that are present in the cafeteria when the students are eating?

A: Yes. We have teachers who eat in the cafeteria and we have other teachers who are present there, yes.

Q: And what are their duties and responsibilities while they are there? The teachers' duties and responsibilities?

A: They kind of monitor things. [JA 948-50]

ful way to combat violence by students is fatuous—particularly where, as here, there is no evidence that school authorities have taken any other steps to ensure that teachers will function effectively in their supposed role as security officers.

Contrary to the Board's assertion, it is not our position that there must be "a statistical nexus between student injuries and drug impaired teachers" before a suspicionless drug testing policy can be adopted. Opp. 21. By the same token, however, it is not enough simply to establish that students confront safety hazards, Opp. 3, 16, 23, and that teachers have a general responsibility to protect students, Opp. 15, 18-19, 23.[4] Under this Court's precedents, what is required at the least is a showing not only that an employee has some safety-related responsibilities, but that those responsibilities are of such a nature that without drug testing—more precisely, without *suspicionless* testing—substantial harm is likely to occur. *See* Petition at 10-15. There is not the slightest evidence in this record to support such a conclusion. *Id.* at 4-6, 15-19.

2. That the Board's suspicionless drug testing program is not a means of protecting student safety, but rather an exercise in symbolism, is laid bare by the Board's repeated assertions that teachers should be subject to such testing because they are "role models." *See* Opp. 7, 13-14, 18-19. This confirms the perception of the four judges who dissented from the denial of rehearing en banc that the testing program, and the decision below sustaining that program, "can only be justified as a political statement

---

[4] Nor is it of consequence that teachers do not have an expectation of continued employment if they use unlawful drugs on the job. Opp. 18. "The issue here is not whether [teachers] can constitutionally be . . . dismissed [for drug use] . . . . The issue here is what steps can constitutionally be taken to *detect* such drug use." *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting).

that drug use by teachers is unacceptable." App. 87a-88a. *Chandler* explicitly rejects such a justification for suspicionless drug testing by government: "a need of the 'set a good example' genre [is not] sufficient to overwhelm a Fourth Amendment objection." 520 U.S. at 322.

The Board also is at pains to declare that "teacher alertness is key not only to student safety but to a positive school experience." Opp. 4. Having shifted ground from "safety-sensitivity" to the furnishing of a "positive school experience," the Board goes on to pepper its Brief in Opposition with references to a "meaningful school experience," *id.*, "doing the best" for "the teaching of children," *id.* at 5, being "competent enough to work with [the students, who are] just smarter than we are," *id.* at 6, and "getting our children educated," *id.* at 7. Petitioner yields to no one in recognizing these as important objectives of public education. But there is no evidence whatsoever that suspicionless drug testing of teacher candidates is necessary or effective for achieving them. The Board's reliance on such considerations is yet another sign that the Board's testing program is born of symbolism rather than of safety-sensitivity.

In sum, the Board has adopted—and the Sixth Circuit has sustained—precisely what this Court proscribed in *Chandler* when it emphasized that to pass constitutional muster, suspicionless drug testing must, at the least, be shown to be an "effective" and "credible means" of addressing a real and urgent need, rather than merely a "symbolic" step. *Chandler*, 520 U.S. at 319-22. *See also Treasury Employees v. Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting) (absent evidence of "a real problem that will be solved by urine testing of . . . employees," such testing is "a kind of immolation of privacy and human dignity in symbolic opposition to drug use").

3. The privacy interests that the Fourth Amendment seeks to protect can survive only if the government is required to justify a search on the basis of demonstrable evidence rather than dubious assumptions. *See Chandler*, 520 U.S. at 319; *Von Raab*, 489 U.S. at 680-87 (Scalia, J., dissenting); *Vernonia*, 515 U.S. at 674-680, 684-86 (O'Connor, J., dissenting). The Sixth Circuit's approval of the Board's suspicionless drug testing program is at odds with this fundamental understanding. That "children are our most important asset," Opp. 7, and that education is of paramount importance, App. 28a-29a, do not, as the Board and the Sixth Circuit appear to believe, justify a failure to require meaningful evidentiary support for a school district's resort to suspicionless testing of teachers or teacher candidates. "As destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities." *United Teachers v. Orleans Parish School Board*, 142 F.3d 853, 857 (5th Cir. 1998).

Under the reasoning of the Sixth Circuit, public school districts across the country would be free to subject teacher applicants—and, indeed, in-service teachers as well—to suspicionless drug testing without any factual showing of a need to do so. *See* Petition at 8-9, 21 n.11. Certiorari should be granted to decide whether such testing is permissible, and also to address the broader question presented by this case as to the type of evidentiary showing that must be made by any agency of government in order to justify suspicionless drug testing of employees.

CONCLUSION

For the reasons stated above and in Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

ROBERT H. CHANIN
JEREMIAH A. COLLINS
(Counsel of Record)
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

RICHARD L. COLBERT
CORNELIUS & COLLINS
Nashville City Center
511 Union Street
Suite 2700
Nashville, Tennessee 37219-0695
(615) 244-1440